

# The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases

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Earlier in this the first year of the new millennium, Professor Larry Marshall was appointed Chief Justice of the United States. The first important case coming before the Marshall Court involved the government's prosecution of Frankly Amorous under the White Slave Traffic Act of June 25, 1910 (the Mann Act), as amended.<sup>1</sup> Defendant Amorous was a law student in Virginia who paid for the airplane ticket of his female lover to travel from North Carolina to Virginia for the admitted purpose of having extramarital sexual relations. The U.S. Attorney prosecuted Amorous for violating the Mann Act, which criminalizes the knowing transportation of "any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense."<sup>2</sup>

The trial judge instructed the jury to convict Amorous if he paid for his lover's transportation with the purpose of bringing her across state lines so that they could engage in extramarital sexual relations, which is a criminal offense in Virginia.<sup>3</sup> The judge based the instruc-

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1. Act of June 25, 1910, ch. 395, 36 Stat. 825 (codified at 18 U.S.C. §§ 2421-2424).

2. Section 2421 of title 18 reads:

Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2421. This reflects the amendment by Pub. L. No. 99-628, § 5(b)(1), 100 Stat. 3511 (1986). Before 1986, § 2421 read, in relevant part:

Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice . . . [s]hall be fined not more than \$5000 or imprisoned not more than five years, or both.

18 U.S.C. § 2421 (1982).

3. VA. CODE ANN. § 18.2-344: "Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4

tion on her reading of the Supreme Court's 1917 interpretation of the statute in *Caminetti v. United States*,<sup>4</sup> which held that the original version of the Mann Act criminalized a broad range of extramarital sexual relations as "immoral practice," and the Court's 1993 decision in *Squalid v. United States*,<sup>5</sup> which held that the amended version of the Mann Act incorporates the *Caminetti* holding and should be read broadly to penalize any sexual activity considered "immoral" by "a relevant regulatory community."<sup>6</sup>

The jury convicted the law student, and the judge sentenced him to eighteen months in prison. The Fourth Circuit affirmed, but voiced doubts about the continued validity of the *Caminetti* and *Squalid* precedents. The Supreme Court granted certiorari to review the legality of the conviction. Through gossipy law clerks, I have gathered documents shedding light on the Marshall Court's treatment of this issue. The following is my reconstruction of the Court's interesting deliberations.

At conference, all nine Justices agreed that the conviction ought to be overturned. Chief Justice Marshall assigned the opinion to himself. In his draft opinion for *Amorous v. United States*, he started with the proposition that the *Caminetti* and *Squalid* precedents interpreting the statute ought to be reaffirmed, based upon the arguments in his earlier law review article for a rule of absolute stare decisis in statutory cases.<sup>7</sup> The Chief Justice's draft opinion candidly noted that the Court has occasionally overruled its precedents interpreting federal statutes in the past, and that *Caminetti* would, under the Court's traditional approach, be a possible candidate for overruling.<sup>8</sup> *Caminetti's* view that the statute criminalized transportation of a woman for extramarital relations was probably an excessively broad interpretation of the stat-

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misdemeanor." See also VA. CODE ANN. § 18.2-345 (criminalizing "lewd and lascivious cohabitation"); VA. CODE ANN. § 18.2-361 (criminalizing "crimes against nature," including oral and anal sexual intercourse between consenting adults); VA. CODE ANN. § 18.2-365 (criminalizing "adultery").

4. 242 U.S. 470 (1917); see also *Cleveland v. United States*, 329 U.S. 14 (1946) (reaffirming *Caminetti* interpretation of 1910 Act).

5. 510 U.S. 435 (1993).

6. The *Squalid* Court was closely divided. A four Justice plurality took the position that *Caminetti* was reaffirmed by the 1986 amendments to the Mann Act. Four dissenting Justices argued that *Caminetti* should be overruled, either because it was a bad statutory decision to start with, or because Congress' amendment had negated it, or for both reasons. The critical fifth Justice concurred in the plurality's result but reasoned thus: *Caminetti* was wrongly decided in 1917; stare decisis, however, counseled against overruling that precedent; the 1986 amendments did not grapple with the *Caminetti* issue and so cannot be said to have negated the precedent.

7. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

8. See generally Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988).

ute in 1917, because it went well beyond the original legislative expectations,<sup>9</sup> and is certainly too broad today, in light of current constitutional protections of sexual privacy.<sup>10</sup>

The Chief Justice's draft opinion argued, however, that henceforth the Court should never overrule its statutory precedents. His argument was taken almost verbatim from his earlier article and ran as follows: Federal judges make a great deal of law in our representative democracy, and most of that judicial lawmaking is unavoidable, even in statutory interpretation.<sup>11</sup> The lawmaking is nonetheless in tension with the overall majoritarian framework of our government, and should be reduced if possible.<sup>12</sup> The usual (tired) strategy for reducing judicial lawmaking is to restrain judicial creativity, but a more productive strategy is to stimulate greater legislative activity, which reduces the need for courts to create new law by updating statutes with creative interpretations.<sup>13</sup> Because an absolute rule of stare decisis for statutory precedents would stimulate at least some additional legislative activity to update statutes, the Court should adopt such a rule.<sup>14</sup> The Chief Justice's opinion therefore reaffirmed the *Caminetti/Squalid* interpretation of the Mann Act as criminalizing extramarital relations. The opinion overturned *Amorous*' conviction, though, because the statute as applied in a case of fornication is an unconstitutional invasion of *Amorous*' right to privacy.

The Chief Justice circulated his draft opinion to the Court, but no other Justice was willing to join the opinion, even though all nine Justices are themselves former professors and, therefore, open to rethinking stare decisis. Three Justices wrote draft concurring opinions, which I reproduce here. I have edited the opinions (deleting most case citations) and added bracketed footnotes of my own to tie their arguments to Chief Justice Marshall's earlier work.

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9. *Caminetti*, 242 U.S. at 497-99 (McKenna, J., dissenting) (legislative history makes clear that Mann Act was only aimed at prostitution and similar mercenary activities related to "white slavery").

10. *See United States v. Wolf*, 787 F.2d 1094 (7th Cir. 1986) (Posner, J.).

11. *See Marshall*, *supra* note 7, at 202-04.

12. *Id.* at 204-07.

13. *Id.* at 207-08.

14. There should be a marginally higher level of congressional oversight in a system in which courts apply a heightened or absolute rule of statutory stare decisis. For in that system the legislators, lobbyists, and public all know that any changes in the interpretation of statutes can come only through legislative action — not through a judicial reversal of the announced interpretation.

*Id.* at 211; *see id.* at 211-19 (supporting argumentation).

*“Opinion of Posnerbrook, J., joined by McNollgast & Schwartz, JJ., concurring in the judgment.* The Chief Justice’s opinion identifies a persistent problem, excessive judicial lawmaking in our representative democracy. It also offers a productive problem-solving approach, namely, bright-line rules that will provide countervailing incentives to the relevant actors (here, incentives to encourage legislators to respond to Supreme Court decisions). The Chief Justice’s suggested rule, however, will not necessarily solve the problem and, instead, may exacerbate countermajoritarian features of our system.

“The evidence is insufficient to reject the Court’s longstanding willingness to overrule its statutory precedents in compelling circumstances. The Chief Justice has a heavy burden of demonstrating that his rule would stimulate the legislature to greater involvement in its constitutional responsibility for updating statutes. He has not met that burden. Several state courts have rules of absolute stare decisis for statutory precedents, yet the Chief Justice has advanced no evidence suggesting that their legislatures are more active in updating statutes than are the national legislature or the legislatures of states having more flexible stare decisis rules.<sup>15</sup> The Chief Justice seeks to avoid the dearth of empirical evidence by relying instead on academic theories. But they provide little more than speculative support for his proposal.

“‘Public choice theory,’ the application of economic principles to political markets, does not indicate significantly, if any, greater legislative involvement under a rule of absolute stare decisis.<sup>16</sup> Public choice theory, like many other theories of the legislative process, assumes that reelection is the most important motivation for legislators. Legislators desiring reelection are interested in appeasing important interest groups, but without offending other organized groups (to the extent this is possible). Legislators, consequently, have an incentive to re-

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15. The Chief Justice reminds us that English courts very rarely overrule statutory precedents and that Parliament has often responded to judicial invitations to reverse court decisions. See Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 2467, 2471 & n.18 (1990). The Chief Justice is wise not to rely on this as evidence supporting his proposal, not only because the English system is different (the Chief Justice’s stated reason), but also because the two points are unrelated. Most judicial decisions containing invitations for Congress or Parliament to overrule have nothing to do with stare decisis. They are typically decisions where a harsh result flows from the statutory language, which courts will implement in most instances. *E.g.*, *TVA v. Hill*, 437 U.S. 153 (1978), *overruled by* Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3752 (1978), and Pub. L. No. 96-69, tit. IV, 93 Stat. 437, 449 (1979).

16. [Marshall, *supra* note 7, at 211, relies on public choice theory to argue: Legislators’ desire to avoid taking controversial positions impels them to shift responsibility as much as possible to courts (and agencies). When the Court hands down a questionable statutory decision for which there is a possibility of judicial overruling, legislators can tell interest groups hurt by the decision that their best recourse is to the Court.]

spond to many of the Court's statutory decisions, whatever this Court's stare decisis rule, when the decisions harm the interests of important groups. These groups will petition the legislators to overrule such decisions, and they will usually be successful if there is little or no organized opposition. Legislators may have fewer incentives to respond to decisions of this Court which benefit some organized groups while hurting other organized groups, because legislators want to avoid offending any politically salient group. But legislators in these 'conflictual' situations have incentives to work out a compromise which will alter the Court's decisions in a way acceptable to most or all the relevant groups. Legislators already have plenty of incentives to respond to the Court's decisions. Nothing in the Chief Justice's opinion changes these incentives in the legislative process.

"The Chief Justice argues that legislators will refer losing interest groups to the court system so long as the Court will sometimes reconsider statutory precedents and that absolute stare decisis will render this strategy less feasible. A difficulty with this argument is that legislators cannot credibly pass the buck under current Supreme Court practice. It takes decades for the Court to overrule virtually any statutory or common law precedent, whatever the stare decisis rule.<sup>17</sup> Interest groups do not want to wait decades. They want action now, or soon. The Chief Justice's rule seems unlikely to make any difference in the short term, namely, the period ten years or so after the statutory precedent. This argument finds support in Congress' willingness to address the Court's precedents under the current regime, in which the Court is quite willing to overrule or reinterpret statutory precedents. I

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17. The Court acted only once in the period 1961 to 1987 to overrule a statutory precedent within five years of its decision. It has never done so after 1965. The Court explicitly overruled statutory precedents in 17 cases between 1971 and 1989. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988); *Eskridge*, *supra* note 8, at 1427-28 (cases 1971-87). Only two of the cases overruled precedents less than 20 years old.

The Chief Justice does not sufficiently appreciate this point. He seems to think that it takes many years to overrule a statutory precedent primarily because the Court now adheres to a super-strong presumption of correctness for its statutory precedents. [See *Marshall*, *supra* note 15, at 2471.] This is not the case. Overruling a statutory precedent in the short term is unlikely because it takes a long time for problems with the precedent to ripen (usually through lower court decisions) and because the Court is too busy to reexamine its precedents constantly. This is the point of *normal* stare decisis and has little if anything to do with heightened stare decisis. Following normal stare decisis, this Court has not in the last century overruled any of its common law precedents within 20 years of their decision. *E.g.*, *United States v. Reliable Transfer Co.*, 421 U.S. 397, 410-11 (1975) (overruling *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855)); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 266-68 (1972) (overruling *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866)); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970) (overruling *The Harrisburg*, 119 U.S. 199 (1886)); see also *Trammel v. United States*, 445 U.S. 40, 51-53 (1980) (overruling *Hawkins v. United States*, 358 U.S. 74 (1958), based on same arguments raised in 1958 dissenting opinion).

reproduce in the margin Supreme Court decisions overruled by Congress between 1982 and 1986 (a period chosen at random).<sup>18</sup> Congress overruled at least twenty-four Supreme Court statutory precedents, not an inconsiderable number. Congress overruled twenty of the twenty-four precedents within ten years of the Court's decisions, sixteen of the twenty-four within five years of the Court's decisions, and twelve of the twenty-four within two years of the Court's decisions. This evidence lends some support to the hypothesis that Congress already has substantial incentives to respond to this Court's statutory precedents in the short term.

"The only argument legitimately left to the Chief Justice is that

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18. *INS v. Phinpathya*, 464 U.S. 183 (1984), *overruled by* Pub. L. No. 99-603, § 315(b), 100 Stat. 3359, 3439-40 (1986) (see 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5728); *Block v. North Dakota*, 461 U.S. 273 (1983), *overruled or modified by* Pub. L. No. 99-598, 100 Stat. 3351 (1986) (see 1986 U.S. CODE CONG. & ADMIN. NEWS 5643, 5643-44); *United States v. New York Tel. Co.*, 434 U.S. 159, 166-68 (1977), *overruled by* Pub. L. No. 99-508, 100 Stat. 1848, 1868-72 (1986) (see 1986 U.S. CODE CONG. & ADMIN. NEWS 3555, 3556, 3599-3603); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), *overruled by* Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (1986) (see S. REP. NO. 388, 99th Cong., 2d Sess. 27-28 (1986)); *United States Dept. of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986), *overruled by* Pub. L. No. 99-435, 100 Stat. 1080 (1986) (see 1986 U.S. CODE CONG. & ADMIN. NEWS 2328, 2328-30); *Smith v. Robinson*, 468 U.S. 992 (1984), *overruled by* Pub. L. No. 99-372, 100 Stat. 796 (1986) (see 1986 U.S. CODE CONG. & ADMIN. NEWS 1798, 1799-811); *Lambert Run Coal Co. v. Baltimore & O.R.R.*, 258 U.S. 377, 382 (1922), *overruled by* Pub. L. No. 99-336, § 3, 100 Stat. 633, 637 (1986) (see 1986 U.S. CODE CONG. & ADMIN. NEWS 1545, 1553); *California v. Nevada*, 447 U.S. 125 (1980), *overruled by* Pub. L. No. 99-200, 99 Stat. 1663 (1985); *DeepSouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972), *overruled by* Pub. L. No. 98-622, 98 Stat. 3383 (1984) (see 1984 U.S. CODE CONG. & ADMIN. NEWS 5827, 5828); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), *overruled or modified by* Pub. L. No. 98-544, 98 Stat. 2750-51 (1984) (see 1984 U.S. CODE CONG. & ADMIN. NEWS 4602, 4603-08); *Busic v. United States*, 446 U.S. 398 (1980), and *Simpson v. United States*, 435 U.S. 6, 10 (1978), *overruled by* Pub. L. No. 98-473, § 1004, 98 Stat. 1837, 2138-39 (1984) (see 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3490-92); *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925 (1984), *overruled by* Pub. L. No. 98-426, § 4, 98 Stat. 1639, 1641 (1984) (see 1984 U.S. CODE CONG. & ADMIN. NEWS 2734, 2774); *Diedrich v. Commissioner*, 457 U.S. 191 (1982), *overruled in part by* Pub. L. No. 98-369, § 1026, 98 Stat. 494, 1031 (1984) (see 1984 U.S. CODE CONG. & ADMIN. NEWS 697, 1328-29); *United States v. Davis*, 370 U.S. 65 (1962), *overruled by* Pub. L. No. 98-369, § 421, 98 Stat. 494, 793-95 (1984) (see 1984 U.S. CODE CONG. & ADMIN. NEWS 697, 1134-35, 1804); *Commissioner v. Standard Life & Accident Ins. Co.*, 433 U.S. 148 (1977), *overruled by* Pub. L. No. 98-369, § 211(a), 98 Stat. 494, 740-41 (1984) (see 1984 U.S. CODE CONG. & ADMIN. NEWS 697, 1072-73, 1748-53); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), *overruled by* Pub. L. No. 98-353, 98 Stat. 333, 390-91 (1984) (see 130 CONG. REC. 14851-52, 17151-59 (1984)); *Federal Maritime Commn. v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), *overruled or modified by* Pub. L. No. 98-237, § 7, 98 Stat. 67, 73-74 (1984) (see 1984 U.S. CODE CONG. & ADMIN. NEWS 167, 174, 222-23); *Rowan Cos. v. United States*, 452 U.S. 247 (1981), *reasoning overruled by* Pub. L. No. 98-21, § 327, 97 Stat. 65, 126-27 (1983) (see 1983 U.S. CODE CONG. & ADMIN. NEWS 143, 183); *Standard Oil Co. of Calif. v. Agsalud*, 454 U.S. 801 (1981), *overruled by* Pub. L. No. 97-473, § 301, 96 Stat. 2605, 2611-12 (1982) (see 1982 U.S. CODE CONG. & ADMIN. NEWS 4580, 4595, 4603); *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), *overruled by* Pub. L. No. 97-393, 96 Stat. 1964 (see 1982 U.S. CODE CONG. & ADMIN. NEWS 3495, 3495); *McCarty v. McCarty*, 453 U.S. 210 (1981), *overruled by* Pub. L. No. 97-252, § 1002, 96 Stat. 718, 730-35 (1982) (see 1982 U.S. CODE CONG. & ADMIN. NEWS 1555, 1570); *Mobile v. Bolden*, 446 U.S. 55 (1980), *overruled by* Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982) (see 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 177-79, 194).

absolute stare decisis will signal groups hurt by a statutory precedent but unable to obtain legislative relief in the short term, to stick with Congress (and not turn to this Court) as the forum for overruling in the long term as well.<sup>19</sup> It is hard to say that such a rule would actually have much effect, due to the difficulty in focusing Congress' attention on old and stale policy issues. But it is equally hard to say that the Chief Justice's proposed rule would not have some benefit along these lines. The issue then is whether there are costs of the proposed rule which would outweigh this quite modest potential benefit. The obvious cost of the proposal is that no one will overrule a number of stupid decisions which never generate sufficient legislative attention over the long haul. This is a substantial cost of the Chief Justice's proposal, not only because it perpetuates inefficient legal rules, but also because its consequences will often be countermajoritarian.

"Consider the occasions in which this Court has overruled old statutory precedents (*i.e.*, those decided more than twenty years ago).<sup>20</sup> The Court has typically contributed to, rather than derogated from, majoritarian policy when it has overruled such statutory precedents. One reason the Court has given for overruling old precedents is subsequent statutory developments.<sup>21</sup> A statutory precedent can be quite plausible when originally decided, but implausible over time if its effects are inconsistent with the terms or policies of statutes subsequently enacted by the legislature. This Court's traditional role in statutory interpretation is to reconcile prior law, including common law and statutory precedents, with new statutes over time. The Chief Justice's rule of absolute stare decisis might prevent this Court from overruling precedents that are practically inconsistent with new statutes. That would often be countermajoritarian, because it would discourage the Court from updating precedents in light of modern

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19. This is a plausible argument for the Chief Justice, because congressional overruling of Supreme Court statutory precedents usually occurs within ten years (if it occurs at all), and judicial overruling of the same type of precedents usually occurs after ten years have passed (if it occurs at all).

20. This analysis draws on Eskridge, *supra* note 8, at 1364-84, 1399-400, 1427-29. The Chief Justice correctly states that the Court rarely finds that an old statutory precedent clearly misconstrued the original legislative expectations. This was a substantial reason in only 3 of the 26 cases between 1961 and 1987 explicitly overruling statutory precedents. *Id.* at 1427-29.

21. This was a reason given by the Court in 10 of the 28 overrulings between 1961 and 1989. See *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 288 & n.12 (1988); *Brown v. Hotel Employees Intl. Union Local 54*, 468 U.S. 491, 504-05, 509-10 (1984); *Monell v. Department of Social Servs.*, 436 U.S. 658, 695-701 (1978); *Califano v. Sanders*, 430 U.S. 99, 105-07 (1977); *Lodge 76, Intl. Assn. of Machinists v. Wisconsin Employment Relations Commn.*, 427 U.S. 132, 154 (1976); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 499-500 (1973); *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 350 (1971); *Carafas v. LaVallee*, 391 U.S. 234, 240 (1968); *Brenner v. Manson*, 383 U.S. 519, 526-27 (1966); *James v. United States*, 366 U.S. 213, 222 (1961).

legislative policy.<sup>22</sup>

"Another reason the Court has given for overruling old precedents has been their impracticability.<sup>23</sup> Statutory precedents often do not work as anticipated. The original statutory terrain changes, as the legislature enacts new statutes and the courts interpret them. Society itself changes, often in response to the statute. The original assumptions undergirding the precedent prove to be wrong, and this renders the precedent unworkable or even counterproductive. It hardly subserves majoritarian lawmaking for the Court to reaffirm a precedent that makes a mess of the legislature's statutory scheme.

"A final reason the Court has given for overruling old precedents has been their tension with evolving constitutional norms.<sup>24</sup> The Court often avoids difficult constitutional issues by reinterpreting statutes. The Chief Justice's absolute rule would, sometimes require the Court to confront these issues before it is ready to do so. Prematurely confronting these issues might tempt the Court toward constitutional activism, which is of course countermajoritarian. Consider this case. The Court should overrule *Caminetti* because that precedent misinterpreted the legislature's original expectations,<sup>25</sup> and the Court should overrule *Squalid* because that precedent unnecessarily perpetuated the earlier error in *Caminetti*. The Chief Justice refuses to overrule these precedents but instead invalidates the statute as applied. He does that by expanding the constitutional right to privacy to include extramarital sexual conduct. That is a bold constitutional step, one that we can

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22. The Chief Justice might well create an exception for these cases, based upon the argument that the subsequent statute "effectively" overrules the precedent. This would be a broad exception that would significantly dilute the Chief Justice's rule, though. It is also inconsistent with the Chief Justice's rule, because the subsequent statute does not squarely overrule the precedent in the cases to which I refer.

23. The Court gave practical reasons as a justification in 13 of the 28 cases overruling statutory precedents between 1961 and 1989. See *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284-86 (1988); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Trammel v. United States*, 445 U.S. 40, 51-53 (1980); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 249-55 (1970); *Lear, Inc. v. Adkins*, 395 U.S. 653, 671 (1969); *Peyton v. Rowe*, 391 U.S. 54, 67 (1968); *Carafas v. LaVallee*, 391 U.S. 234, 240 (1968); *Brenner v. Manson*, 383 U.S. 519, 526-27 (1966); *Swift & Co. v. Wickham*, 382 U.S. 111, 124 (1965); *Harris v. United States*, 382 U.S. 162, 167 (1965); *Fay v. Noia*, 372 U.S. 291, 435-36 (1963); *James v. United States*, 366 U.S. 213, 222 (1961).

24. The Court relied on subsequent constitutional developments to overrule statutory precedents in 6 of 28 cases between 1961 and 1989. See *Welch v. Texas Highways & Pub. Transp. Dept.*, 483 U.S. 468, 476-78 (1987); *Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987); *Guardians Assn. v. Civil Serv. Commn.*, 463 U.S. 582 (1983); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); *Griffin v. Breckenridge*, 403 U.S. 88, 92-96, 101-02 (1971); *Brenner v. Manson*, 383 U.S. 519, 526-27 (1966).

25. See *Caminetti*, 242 U.S. at 497-99 (McKenna, J., dissenting) (sponsor and committee statements reveal that Mann Act sought to criminalize prostitution rings, not sexual relations generally).



avoid by overruling the precedent. Confessing this Court's own error is the proper democracy-enhancing stance in this case. Using this case as an occasion to create new constitutional law is countermajoritarian. The Chief Justice's proposed rule of absolute stare decisis threatens to be countermajoritarian over time, because it encourages this Court to engage in unnecessary constitutional decisionmaking.

"A final consequence of the Chief Justice's proposed rule is the most troubling. The Constitution sets forth a clearly defined system of separate powers. The Chief Justice is correct in saying that the legislature should make all major policy choices in our polity. The Chief Justice is also correct in saying that the courts should do nothing more than interstitial lawmaking. The Chief Justice is not demonstrably correct in saying that throwing the Court's own mistakes back to the legislature subserves the democratic process. The legislature's agenda is not infinitely elastic. Thousands of issues compete for its attention, and only a few important policy initiatives can run the procedural juggernaut each year. Our tossing complex issues of legal coherence back to the legislature further crowds its agenda. The legislature might indeed respond by overruling the precedents itself. But the opportunity costs will often be high. The legislature has better things to do than clean up our own Augean stables."

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"*Opinion of Fisserman, J., joined by Michaelminow & Guidobresi, JJ., concurring in the judgment.* We are deeply disturbed by the Chief Justice's inaugural opinion. We find the opinion filled with talk of reining in judicial discretion and of stimulating the legislature to greater activity. What we do not find in the Chief Justice's opinion is any concern about justice. Justice in the individual case. Equal justice for all our citizens. The Chief Justice's opinion loses sight of the human dimensions of this case. This case is not about stare decisis. This case is about a law student — albeit an unhappily named one — who was nabbed by authorities for doing what most law students do these mobile days, often bringing their lovers across state lines. This case is about a statute which has profound constitutional problems and which — surely as a result of those problems — is almost never enforced anymore. This case is an outrage. Its outrageousness sheds great light on *Caminetti* and *Squalid*, precedents we now ought to overrule.

"While the Chief Justice ultimately agrees with us about the result, for perfectly good constitutional reasons, the implications of his absolute rule of stare decisis in statutory cases trouble us greatly. Its rigid-

ity will yield injustice in many cases, which we believe undermines the 'judicial Power.' Under Article III, the judge in our national system of courts handles 'Cases or Controversies.' This reminds us of the traditional role of the judge, which is to hand down justice to the parties in the Case or Controversy. This is very different from the role of a legislator, who makes rules prospectively and usually without attention to a concrete case. By asking judges to render unjust results in cases where governing precedent is demonstrably wrong, the Chief Justice is asking judges to ignore their fundamental duty — to do justice in the individual case or controversy.

"To be sure, the Chief Justice believes that he is doing justice, by constructing democracy-enhancing rules that *might* in the long run produce greater social justice (we are doubtful about this, for the reasons suggested by Justice Posnerbrook). This represents an impoverished vision of our constitutional democracy, however. The Chief Justice's vision seems to make three assumptions about our republic: In statutory interpretation, courts are simply the agents of the legislature and play a subservient role (the agency assumption). As the legislature's agents, courts ought to have as little policymaking discretion as possible (the interstitial policymaking assumption). As agents with at most interstitial policymaking power, courts ought to make rules by reference to their effects on the overall system, often sacrificing justice in the individual case (the *ex ante* assumption). These are profound and disturbing assumptions that underlie the Chief Justice's opinion. None of them is easily defensible within our constitutional traditions.

"We start with the agency assumption — which we admit is widely believed but which we contend is not rigorously established. Virtually nothing in the Constitution supports this assumption, and a good deal undermines it. The Constitution's Preamble says that sovereignty in our polity rests with 'We the People.' Unlike England, we are a polity where state power is dispersed among three co-equal branches, not concentrated in one branch (the legislature). This is one reason we fought the Revolution and is a background assumption of the Constitution's structure and anticipated operation. Under Article I, the legislature enacts statutes. Under Article III, the judiciary — a co-equal branch — interprets and applies those statutes in actual 'Cases or Controversies.' The constitutional language and structure do not suggest that courts are servile agents who owe their complete fealty to the legislature. Rather, it suggests that courts owe their complete fealty to 'We the People.' This reveals the reason for Article III's focus on resolving the Case or Controversy, not on serving the legislature. Courts are not just agents of the legislature. Rather, the Constitution

suggests that both the legislature and the courts are agents of the public good. Or, stated another way, the legislature and the courts are 'partners' serving the ongoing enterprise of our public-seeking government.

"Even if we accepted the agency assumption, we could not accept the interstitial policymaking assumption. The Chief Justice seems horrified by judicial discretion, and seems to assume that diligent and faithful agents do not make policy choices — at least not very often. This is very doubtful. If judges are like agents at all, they are like 'relational agents,' namely, those agents given a long-range task and charged with using their 'best efforts' to accomplish that task over time. Relational agents are given detailed directives in many cases, but if new problems arise over time and the principal is not forthcoming with new directives, the relational agent will take some degree of policy initiative, often bending the old directives beyond recognition. Most — but we admit, not all — principals would consider a relational agent to be a 'good' one if she exercised a great deal of discretion and used her best judgment in each case, rarely bothering the principal with questions about specific application of the directives. Conversely, most principals would be disappointed with a relational agent who literalistically followed the principal's directives in every situation, often with poor results; who came running back to the principal every time a directive seemed unclear in its application to specific circumstances; and — most of all — who held firmly to her original interpretation of the principal's directives even though the interpretation produced bad results and who rationalized her rigidity by saying, 'Well, the principal must know about this and she has never done anything about it, so my hands are tied, because only the principal can change my earlier interpretation, which I admit was pretty stupid!'

"Even if we accepted the first two assumptions underlying the Chief Justice's theory, we would find the third one unacceptable. Indeed, the *ex ante* assumption for issues like this seems incoherent with the Chief Justice's first two assumptions. On the one hand, the Chief Justice tells us that we are crabbed little agents who ought to have little policymaking discretion. On the other hand, the Chief Justice asks us to make a judgment about issues of political interaction that are very complicated and laden with significant policy implications — for the crowdedness and composition of the legislative agenda and for justice in individual Cases and Controversies, as well as for our own docket. How can the Chief Justice ask us to make such a policy-laden political judgment when he believes we are nothing but crabbed little agents? Isn't his position self-contradictory?

"It seems to us that if we accept the Chief Justice's reductionist vision of the role of this Court in statutory interpretation and if we accept the Chief Justice's *ex ante* arguments — none of which we can do — our proper course of action is to encourage the Chief Justice to use his position as head of the Judicial Conference to present his proposal for absolute stare decisis to Congress. Even from our very different assumptions, we should be most interested in Congress' response. We think that Congress would tell us that such a rule is a bad rule, because Congress has since the 1980s overruled a good many of our statutory precedents, because Congress does not want us to burden their agenda with yet more issues that the Court is better equipped to deal with anyway (*e.g.*, tension between statutory precedents and subsequent statutory policies; impact of evolving public values on earlier statutory precedents), and because Congress believes that federal judges should do justice in individual Cases and Controversies. We might be mistaken. Congress might decide to enact such a rule. But it is bootless for the Chief Justice to usurp a rule that his own assumptions leave to Congress, a rule that marginalizes what should be central in our practice of judging — Do justice."

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*"Separate Opinion of MacFinley, J., joined by Kennedy, J., concurring in part and dissenting in part and concurring in the result.* The Chief Justice's opinion and the rule it announces are crazy. Its rhetoric purports to create a rational rule for treating statutory precedents, yet its purported rationality is dependent upon a range of irrational assumptions and upon a series of questionable logical leaps. Questions confront the Chief Justice's proposed rule and its underlying argumentation at every turn.

"Why should anyone care about changing the stare decisis rule for statutory precedents? It is a trivial issue. This Court overrules about one statutory precedent a Term. Why is this such a great calamity? Does it really contribute to majoritarianism and legislative supremacy for the Court to announce that it will no longer overrule statutory precedents? The Chief Justice thinks so, Justice Posnerbrook thinks not, and we find no basis for forming any opinion at all, since the debaters rely on academic public choice theory, which has been persuasively debunked from many different perspectives. Even if there were probable answers in this debate, how is this debate anything but an intellectual exercise? Even as an intellectual exercise, however, the Chief Justice's proposal goes nowhere. Consider the vulnerability of the Chief Justice's rule to standard highbrow-intellectual tests.

"Is the Chief Justice's proposal internally coherent? Surprisingly not. In a long line of precedents, this Court has *held* that statutory precedents can be overruled. The Chief Justice proposes that we should henceforth never overrule statutory precedents, but doesn't his proposal actually overrule a long line of 'statutory precedents'? The Chief Justice tries to wiggle out of this problem by arguing that the Court's rule of *stare decisis* in statutory cases is not itself a matter of statutory interpretation but is something more.<sup>26</sup> Well, what is it? Although inspired by separation of powers concerns, the Chief Justice never makes the claim that this Court's longstanding practice of occasionally overruling statutory precedents is unconstitutional.<sup>27</sup> So it's hard to view the issue as one of constitutional interpretation. If our rule is neither statutory interpretation nor (as far as anyone can make out) constitutional interpretation, just about the only thing left is 'federal common law.' But, unhappily for the Chief Justice, his proposed rule of absolute *stare decisis* logically applies to common law precedents just as much as it does to statutory precedents, and he admits that it would be incoherent to have a different rule for common law precedents.<sup>28</sup> Therefore, under his own approach, the Chief Justice is wrong to overrule such a long line of precedents, however he chooses to characterize them.

"Is it coherent to establish a tough bright-line rule for this Court's statutory and common law precedents so as to stimulate more congressional activity, and not to do so for other precedents? We think not. For example, why shouldn't the Chief Justice favor a rule in which a consensus of the courts of appeals on a statutory issue essentially binds this Court? Such a rule would have some complexities (e.g., defining a court of appeals consensus) but is not so different from Justice Stevens' clearly articulated position in the 1980s.<sup>29</sup> For that matter, why not a rule of absolute agency *stare decisis*, in which agency interpretations which pass initial judicial review cannot later be changed by the agency, or perhaps even by the courts? Surely Congress, rather than an agency, is the more legitimate body to change

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26. ["[T]he question of an appropriate approach to statutory *stare decisis* is not simply a matter of statutory interpretation — it implicates the role of the federal courts in the constitutional system. As such, it should not be subject to the rule proposed for matters of pure statutory interpretation." Marshall, *supra* note 7, at 220 n.199.]

27. [See *id.* at 200-23 (basing absolute *stare decisis* rule on proper allocation of decisionmaking between Court and Congress but nowhere arguing that the existing *stare decisis* rule is unconstitutional).]

28. [See *id.* at 222-23.]

29. [In the 1980s, Justice Stevens argued that the Court generally ought to defer to lower court consensus. *E.g.*, *McNally v. United States*, 483 U.S. 350, 376-77 (1987) (Stevens, J., dissenting); *Commissioner v. Fink*, 483 U.S. 89, 104-06 (1987) (Stevens, J., dissenting).]

agency interpretations; and such a rule, like a rule binding the Court to a court of appeals consensus, would send a *really strong* message to Congress that it must monitor judicial *and* agency opinions and make whatever corrections are needed, rather than waiting for this Court or the agencies to make policy changes.<sup>30</sup> The Chief Justice seems disinclined to expand upon his absolute stare decisis rule, albeit for pragmatic rather than theoretical reasons. Yet all of the other members of this Court believe the proposal as a whole is impractical. If the Chief Justice is, for practical reasons, unwilling to urge absolute stare decisis for court of appeals consensus or for agency interpretations, then why shouldn't practical problems dissuade him from urging absolute stare decisis for statutory precedents? That is, indeed, the next question.

"Will the Chief Justice's proposed rule really remove efforts to reconsider statutory precedents from this Court's docket? Of course not. As we noted earlier, this Court rarely overrules a statutory precedent explicitly, for even under our traditional approach statutory precedents are entitled to a strong presumption of correctness. A study done in the 1980s, for example, found only twenty-six explicit overrulings between 1961 and 1987.<sup>31</sup> But it is telling that the same study found twenty-four cases in which the Court implicitly overruled its statutory precedents.<sup>32</sup> The study also found thirty-five cases in which the Court significantly revised statutory precedents by rejecting reasoning the Court characterized as 'dicta.'<sup>33</sup> An apparent implication of the study is that the strong presumption against overruling statutory precedents still left the Court an enormous amount of discretion to reinterpret precedents it didn't like, but without explicitly overruling them. By distinguishing away undesirable precedents on their facts — a central judicial mode of reasoning — the Court can do essentially the same thing under the Chief Justice's absolute rule that it has long been doing under the previous stare decisis rule.<sup>34</sup>

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30. And why shouldn't the Chief Justice favor absolute stare decisis in constitutional cases? The Court's expansive willingness in the twentieth century to overrule its constitutional precedents at almost every turn might help explain (to the Chief Justice, at least) why there have been no substantive constitutional amendments after the repeal of Prohibition in 1933. Under the Chief Justice's analysis, the Court's flexible approach (vastly more flexible than its approach to statutory precedents) essentially removed important constitutional issues from the constitutionally assigned procedure for change — through constitutional amendment (Article V). To encourage the operation of the majoritarian mechanism for changing the Constitution, one might expect the Chief Justice to urge absolute or strict stare decisis for constitutional precedents as well.

31. [See Eskridge, *supra* note 8, at 1427-29.]

32. [See *id.* at 1430-34 (listing cases and providing evidence from within the Court's opinions, as well as concurring and dissenting opinions).]

33. [See *id.* at 1435-39.]

34. The Chief Justice has a much rosier view than we do. He seems to think that Justices

"Is it democracy-enhancing to throw the big policy issues back to Congress? The Chief Justice's main normative pitch is that democracy requires Congress to make all the big decisions, but such a pitch rests upon a strained (albeit widely believed) vision of democracy. The Chief Justice flogs the idea that there is a democracy continuum, with Congress at the top and this Court at the bottom. That hierarchy is most believable if you are a well-to-do white male, for it is they who have traditionally controlled the legislative process, which effectively marginalizes the poor, women, persons of color, gay men and lesbians, socialists, and people who don't speak English well. When you add up the numbers, the marginalized groups are seventy to eighty percent of the population. Consider the Mann Act (how aptly named). It was enacted by a Congress when women could not vote as a matter of law, and blacks and the poor could not vote as a matter of practice. Our exclusion shows up in the law, which mirrors the prejudices and stereotypes shared by white well-to-do men in the early part of the century. If one wants to appeal to majoritarianism, the Mann Act is unconstitutional, for it has never represented the interests of most of America. The Chief Justice probably believes things are significantly 'better' now, for women and blacks are at least able to vote (and the Mann Act in 1986 was amended to be at least apparently gender-neutral). We challenge that view. Congress is still lily white (for example, no African-Americans sit in the Senate, a few dozen sit in the House), male (two women are in the Senate, several dozen in the House), and wealthy (the Senate is a white male millionaires' club, and the House only somewhat less so). While marginalized groups at least have organized lobbies nowadays, the overwhelming majority of the lobbies

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would be "red-faced" to distinguish away precedents, but his only example cuts against him. In *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), this Court declined to overrule *Runyon v. McCrary*, 427 U.S. 160 (1976). *Runyon* held that the Civil Rights Act of 1866 protected black parents whose children had been excluded from private schools on grounds of race. *Patterson* was a lawsuit under the same statute by a black woman who claimed she was discharged from her job on grounds of race. The Chief Justice says: "It is hard to imagine, for example that any member of the Court in *Patterson*, much less a majority of the Court, could have pretended to distinguish away *Runyon* . . . ." [See Marshall, *supra* note 7, at 218 (same quote).] The Chief Justice is quite wrong. While both *Patterson* and *Runyon* involved racial discrimination in contract matters, the former involved job discrimination, while the latter involved education discrimination. Job discrimination claims against private employers were after 1964 comprehensively regulated by Title VII, whose elaborate procedures could be circumvented easily — probably contrary to the intent of the 1964 Congress — by filing under the 1866 statute instead (as *Patterson* herself did). Not only would this allow the Court in *Patterson* to distinguish *Runyon*, but this is in fact the approach five Members of this Court actually did take to support their willingness to narrow *Runyon*. *Patterson*, 109 S. Ct. at 2374-75. So far as we know, those five Justices were not "red-faced," even though the four dissenting Justices accused them of subverting stare decisis. See 109 S. Ct. at 2379 (Brennan, J., concurring in the judgment in part and dissenting in part); 109 S. Ct. at 2395-96 (Stevens, J., concurring in the judgment in part and dissenting in part).

are still white and male and well-to-do. Given these political realities, is it any surprise that Congress has never repealed the Mann Act, and that its trivial amendments to the statute in 1986 failed to grapple with the *Caminetti* issue?<sup>35</sup> When the decision came down in 1917, Congress probably thought it was great, and after the statute became little-enforced (and usually against the poor and politically marginal) no one in the wealthy white male club cared. How is any of this majoritarian? The Chief Justice has been brainwashed by law. He should wake up and see the reality, that Congress 'represents' the views of white male elites and not the views of the majority of the population, and that for many of us the Court is the only potential 'representative' we have.

"Will the Chief Justice's proposal have countermajoritarian consequences? We believe so. It will exacerbate the antimajoritarian features we have identified in the Congress.<sup>36</sup> There are usually winner groups and loser groups in the big statutory interpretation cases. If the losers are well-organized elite groups (even better, a coalition of them), they can get the issue on the legislative agenda, usually pretty quickly, and have at least a shot at overruling the precedent. If the losers are not well-organized groups, and especially if they are blue collar or poor, it is much harder for them to get the issue on the legislative agenda, and substantially harder to get the precedent overruled by Congress. Under the Chief Justice's proposal, the 'haves' come out way ahead. Their wins — unless they are wins against other 'have' groups — are assured, and their losses can be dealt with through legislative overruling at least in some cases. 'Have-not' groups, on the

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35. The House committee report accompanying the 1986 amendment, for example, reveals no clear understanding of the *Caminetti* issue. The committee did complain that the original language (transportation "for any other immoral purpose") was too broad, but substituted language ("sexual activity for which any person can be charged with a criminal offense") which is almost as broad and which incorporates the sexist puritanical standards of state and even local laws regulating sexual conduct. See H.R. REP. NO. 99-910, 99th Cong., 2d Sess. 8 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5952, 5958. (There was no Senate committee report for this bill.) Indeed, by linking the federal crime to "sexual activity for which any person can be charged with a criminal offense," including state criminal statutes, the 1986 revision may be a step backwards from *Caminetti* (though we don't necessarily think that was Congress' expectation). For example, Virginia law criminalizes oral sex between husband and wife, VA. CODE ANN. § 18.2-361 (criminalizing "crimes against nature," including oral sex between a man and a woman), which is not necessarily an "immoral purpose" under *Caminetti*.

36. [See also Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 104-07 (1988). Marshall, *supra* note 7, at 227, finds that this sort of argument "is based on the very objectionable premise that it is legitimate for courts to shape doctrines of statutory interpretation in ways that either mitigate the effects of Congress' actual decisions, or try to keep issues out of the congressional arena altogether." I disagree here, as well as elsewhere, with Marshall's characterization of this argument, which in no way seeks to remove issues from the legislative agenda and is just realistic about what is likely to get on that agenda. Indeed, this argument merely reflects Marshall's own belief that the Court might consider the overall functioning of our democracy in crafting its rules of interpretation.]



other hand, lose what is often their only effective forum for overruling a bad precedent, namely, the courts. We do not believe these are iron-clad rules of politics, but they frequently explain things rather well. We think there is a real danger that the Chief Justice's proposed rule will exacerbate the already-existing unfairness of the legislative process for marginalized Americans.

"Enough has been said about an issue that is doomed to the ash-cans of academe. If we want to do anything in this area, we should be making it easier, rather than harder, to overrule statutory precedents."

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After his colleagues circulated their concurring opinions, Chief Justice Marshall circulated a "Memorandum to the Conference," which suggested a new opinion for the Court. The Chief Justice's revised opinion held that *Amorous*' conviction should be vacated under a dynamic reading of *Caminetti* and *Squalid*.<sup>37</sup> The Chief Justice reasoned that only the "legal standard" of *Caminetti* and *Squalid* is binding on the Court, not their application to any specific set of facts. The legal standard of the precedents is that *Amorous* is to be convicted only if his conduct is 'immoral in light of current social mores.' Since our mores in 2001 are vastly different from those in 1993 (*Squalid*) or 1917 (*Caminetti*), the Chief Justice found himself free to reach a different result in *Amorous* and yet proclaim himself loyal to *stare decisis*.

Although the Chief Justice's opinion ultimately attracted only enough votes (Justices MacFinley and Kennedy) to be a plurality opinion in the case, its publication last month has created a sensation and has thrust the Chief Justice into the forefront of the "dynamic statutory interpretation" movement. I applaud the dynamism of the Chief Justice's final opinion. It reminds us that even adherents of judicial restraint (judges as agents) ought to interpret statutes dynamically when the statutes use broad terms drawn from or similar to common law ideas.<sup>38</sup>

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37. See Marshall, *supra* note 15, at 2470.

38. Thus Chief Justice Marshall's willingness to interpret general terms (such as "immoral purpose") very dynamically might justify dynamic interpretation of many of the most frequently litigated federal statutes. See, e.g., 15 U.S.C. §§ 1-2 (Sherman Act's prohibitions of contracts "in restraint of trade" and attempts "to monopolize"); 15 U.S.C. §§ 13a (Robinson-Patman Act's prohibition against price "discrimination" for the purpose of "destroying competition"); 15 U.S.C. § 77(b)(1) (Securities Act definition of "security" by reference to several common law commercial forms); 15 U.S.C. § 78j (Securities & Exchange Act § 10(b) prohibition of "manipulative and deceptive device"); 18 U.S.C. § 1001 (criminalizing "false, fictitious or fraudulent statements"); 18 U.S.C. §§ 1341 & 1343 (criminalizing "any scheme or artifice to defraud" using mail or wire communications); 18 U.S.C. § 1951 (Hobbs Act criminalizing "robbery" and "extortion"); 18 U.S.C. § 1961 (RICO provisions defining "racketeering activity" and "enterprise" by reference to common law terms); 42 U.S.C. §§ 1981-1985 (various "anti-discrimination" statutes); 42 U.S.C. § 2000e-2(a) (Title VII prohibiting "discrimination" in employment practices).